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## ARTICLE

# Legal Aspects of Mutual Non-Denial and the Relations Across the Taiwan Straits

CHUN-I CHEN<sup>†</sup>

## INTRODUCTION

On May 30, 2011, President Ma Ying-jeou of the Republic of China (Taiwan) attended the opening ceremony of the 2011 International Law Association (ILA) Asia-Pacific Regional Conference held in Taipei, Taiwan. In his welcome address, President Ma advocated the concept of “mutual non-denial” as an effective approach to handle complex and sensitive cross-strait relations.<sup>1</sup>

Why did he say that? Observers generally agreed that Dr. Ma Ying-jeou’s inauguration as president of the Republic of China in May 2008 signified a significant change in the Taiwan’s Mainland China policy.<sup>2</sup> Since then, seven meetings of Straits Exchange Foundation (SEF) in Taiwan and the Association for Relations Across the Taiwan Straits (ARATS) in mainland China have been held and have produced 16 agreements.<sup>3</sup> In addition to making

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<sup>†</sup> Professor, Department of Diplomacy and Department of Law, National Chengchi University, Taipei, Republic of China (Taiwan). This article is dedicated to my mentor, Professor Hungdah Chiu, a great teacher, who taught students so many things, and cared for them so much. This is why we respect him, appreciate him, and cherish all those good memories. We owe much to him.

1. Ma Ying-jeou, President of the Republic of China (Taiwan), Address at the 2011 International Law Association Asia-Pacific Regional Conference (May 30, 2011), *available at* <http://english.president.gov.tw/Default.aspx?tabid=491&itemid=24496&rmid=2355>.

2. E.g., KERRY DUMBAUGH, CONG. RESEARCH SERV., RS22853, TAIWAN’S 2008 PRESIDENTIAL ELECTION 3–6 (2008); Tang Shaocheng, *Relations Across the Taiwan Strait: A New Era* (UNISCI Discussion Papers, No. 21, 2009). See generally Donald S. Zagoria, *Cross-Strait Relations: Cautious Optimism* (National Comm. on Am. Foreign Policy, 2009), *available at* <http://ncacp.org/articles/09%20cross%20strait%20relations-%20cautious%20optimism.pdf>.

3. For a comprehensive list of the cross-strait agreements from 1990 to 2009 and translated texts of such agreements, see Pasha L. Hsieh & Pei-Lun Tsai, *Special Report: Cross-Strait Agreements: 1990-2009*, 27 Chinese (Taiwan) Y.B. INT’L L. & AFF. 164, 164–227. For a comprehensive list of cross-strait meetings, see *Li Ci Hui Tan Zong Lan* (歷次會

regular and direct air travel between the two sides possible, the SEF-ARATS negotiations also finalized the Economic Cooperation Framework Agreement (ECFA) to reduce cross-strait trade barriers. From Taiwan's perspective, these promising developments have proven that mutual non-denial is a workable model for maintaining peace and stability across the Taiwan Straits.<sup>4</sup>

This article will analyze mutual non-denial within the context of cross-strait relations in memory of Professor Hungdah Chiu, who advocated the concept of mutual non-denial since the 1990s. The state of relations between Mainland China and Taiwan<sup>5</sup> and their relevance to international law and affairs have always interested scholars and practitioners around the world and much has been written on issues such as the One-China principle, the legal status of the Republic of China (ROC), and its territory sovereignty.<sup>6</sup> Thus, mutual non-denial as a cornerstone of President Ma's mainland China policy is certainly worthy of further discussion.

Part I of this article provides a brief background on the evolution of cross-strait relations from 1949 to present and part II analyzes mutual non-denial, with reference to considerations in the ROC's domestic laws. Part III reviews the post World War II experiences of East and West German relations and international law to search for precedents for the concept of mutual non-denial. Finally, implications

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談總覽) [Overview of Previous Talks], HAI XIA JIAO LIU JI JIN HUI (海峽交流基金會) [STRAITS EXCH. FOUND.], <http://www.sef.org.tw/lp.asp?CtNode=4306&CtUnit=2541&BaseDSD=21&mp=19> (last visited Apr. 16, 2012).

4. See Ma Ying-Jeou, *supra* note 1.

5. In this article, the terms "Taiwan" and "ROC", as well as the terms "Mainland China" and "PRC" will be used interchangeably. Cross-strait relations, instead of ROC-PRC relations, is used here in order to avoid reference to sovereignty disputes.

6. See Björn Ahl, *Taiwan*, MAX PLANCK ENCYCLOPEDIA PUB. INT'L L., <http://www.mpepil.com/> (follow "List of Articles by Author" hyperlink; then follow "Ahl, Björn" hyperlink; then follow "Taiwan" hyperlink) (providing a select bibliography). See generally James R. Crawford, *THE CREATION OF STATES IN INTERNATIONAL LAW* (2006); Jonathan I. Charney & J. R.V. Prescott, *Resolving Cross-Strait Relations between China and Taiwan*, 94 AM. J. INT'L L. 453 (2000); Chi Chung, *International Law and the Extraordinary Interaction between the People's Republic of China and the Republic of China on Taiwan*, 19 IND. INT'L & COMP. L. REV. 233 (2009); Augusto Hernández-Campos, *The Criteria of Statehood in International Law and the Hallstein Doctrine: The Case of the Republic of China on Taiwan*, 24 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 75 (2006); Pasha L. Hsieh, *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan*, 28 MICH. J. INT'L L. 765 (2007) [hereinafter Hsieh, *Unrecognized State*]; Pasha L. Hsieh, *The Taiwan Question and the One-China Policy: Legal Challenges with Renewed Momentum*, 84 DIE FRIDENS-WARTE: J. INT'L PEACE & ORG. 59 (2009) [hereinafter Hsieh, *Taiwan Question*]; Tzu-wen Lee, *The International Legal Status of Republic of China on Taiwan*, 1 UCLA J. INT'L L. & FOREIGN. AFF. 351 (1996).

of mutual non-denial to cross-strait relations and international law are discussed in Part IV.

#### I. CROSS-STRAIT RELATIONS: 1949 TO PRESENT

Cross-strait relations can be divided into three eras: 1895 to 1945, 1945 to 1949, and 1949 to the present.<sup>7</sup> From 1895 to 1945, Taiwan was part of the Japanese empire due to a Qing dynasty concession ceding Taiwan to the Empire of Japan under the Treaty of Shimonoseki in 1895.<sup>8</sup> From 1945 to 1949, Taiwan and the Chinese mainland were under the sovereignty of the Republic of China (ROC).<sup>9</sup> After losing the Chinese Civil War to the Communist Party of China in 1949, the ROC government retreated from the Chinese mainland to Taiwan. Today, the ROC government effectively governs the island of Taiwan, the Pescadores and the islands of Kinmen and Matsu.<sup>10</sup> The ROC's Constitution asserts a claim to sovereignty over all of China, and the ROC government maintains that it has never unequivocally asserted that Taiwan is an independent state.<sup>11</sup>

Before October 25, 1971 most western nations and the United Nations regarded the ROC government as the sole legitimate government of China. However, in 1971 the UN General Assembly voted to give China's seat in the United Nations to the People's

7. Hsieh, *Taiwan Question*, *supra* note 6, at 60–61.

8. Article II of the Treaty of Shimonoseki stipulated: "China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals, and public property thereon: . . . (b) The island of Formosa, together with all islands appertaining or belonging to the said island . . ." CHINA AND THE TAIWAN ISSUE 214 (Hungdah Chiu ed., 1979) (reprinting the Treaty of Shimonoseki (Cession of Taiwan)). *See also* Ahl, *supra* note 6, ¶ 4.

9. Hungdah Chiu, *The Question of Taiwan in Sino-American Relations*, in CHINA AND THE TAIWAN ISSUE, *supra* note 8, at 148.

10. For general geographical information on Taiwan, see GOVERNMENT INFORMATION OFFICE, THE REPUBLIC OF CHINA YEARBOOK 17–18 (2011), available at <http://www.gio.gov.tw/taiwan-website/5-gp/yearbook/docs/ch01.pdf>.

11. *See, e.g.*, MINGUO XIANFA art. 4 (1947) (Taiwan) ("The territory of the Republic of China within its existing national boundaries shall not be altered except by a resolution of the National Assembly."); Jason Hu, *Evolution of Concepts and Principles of Contemporary International Law: The ROC as a Case Study*, 16 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 80, 80–87 (1998) (discussing the ROC's quasi-state status under international law); Ma Ying-jeou, *supra* note 1 (distinguishing between the ROC's "constitutional sovereignty" over mainland China and its authority to govern there); Crawford, *supra* note 6, at 217 (distinguishing "between the validity of the grant of independence to a State, and the validity of its constitution").

Republic of China (PRC).<sup>12</sup> Since then, most states have recognized the PRC and severed formal diplomatic relations with Taiwan. Indeed, as of 2011, only 23 sovereign States have official diplomatic relations with Taiwan.<sup>13</sup> In 1979, the United States also recognized the PRC government to be the sole de jure government of China.<sup>14</sup> Under such circumstances, issues surrounding Taiwan's participation in international organizations and its treatment in both diplomatic relations and domestic courts have become among the most enduring problems in international law.<sup>15</sup>

In its 2000 white paper on the One China Principle and Taiwan issues, the PRC government states that the Taiwan question is by definition an internal Chinese affair,<sup>16</sup> contending that the ROC government ceased to be the legitimate government of China after its retreat to Taiwan in 1949.<sup>17</sup> Beginning in 2002, Beijing started to claim both sides of the Taiwan Straits as part of China.<sup>18</sup> However, the PRC continues to assert the right to use force against Taiwan if it declares independence.<sup>19</sup> In the international arena, the PRC requires states to give no recognition to the ROC as a condition of maintaining diplomatic relations with the PRC. The PRC also opposes Taiwan's efforts to accede to international organizations.<sup>20</sup> This is a situation

12. See G.A. Res. 2758, U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429, at 2 (Oct. 25, 1971).

13. *Diplomatic Allies*, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF CHINA (TAIWAN), <http://www.mofa.gov.tw/EnOfficial/Regions/AlliesIndex/?opno=f8505044-f8dd-4fc9-b5b5-0da9d549c9794&mp=6> (last visited Apr. 12, 2012). Many States have developed substitutes for diplomatic relations to maintain quasi-official bilateral relations with Taiwan. Relations between the United States and Taiwan are conducted through the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States. See Hungdah Chiu, *The International Legal Status of the Republic of China (Revised Version)*, OCCASIONAL PAPERS/REPRINT SER. CONTEMP. ASIAN STUD., no. 5, 1992, at 1, 19–22 [hereinafter Hungdah Chiu, *Legal Status*].

14. *Joint Communiqué on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China January 1, 1979*, 79 DEP'T ST. BULL. 25, 25 (1979), reprinted in 18 ILM 274 (1979).

15. For a description of how foreign courts regard the sovereignty of Taiwan, see Hsieh, *Unrecognized State*, *supra* note 6, at 773.

16. Fan Fen Lie Guo Jia Fa (反分裂国家法) [Anti-Secession Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 14, 2005, effective Mar. 14, 2005), arts. 2–3 (Lawinfochina) (China).

17. E.g., Taiwan Affairs Office & Info. Office of the State Council, *The One-China Principle and the Taiwan Issue* (2000), GOV.CN (Feb. 2000), [http://english.gov.cn/official/2005-07/27/content\\_17613.htm](http://english.gov.cn/official/2005-07/27/content_17613.htm).

18. Tan Shaocheng, *A Comparison between Intra-German Relations in the 1970s and Cross-Strait Relations Since 2008*, 46 ISSUES & STUD. 1, 10 (2010).

19. Anti-Secession Law, art. 8.

20. See, e.g., Ahl, *supra* note 6, ¶¶ 23–25.

similar to the Hallstein Doctrine in Germany, wherein the government of West Germany announced that it would not establish or maintain diplomatic relations with any country that recognized East Germany during the 1950s and 1960s.<sup>21</sup> The Hallstein Doctrine was replaced in 1969 by Chancellor Willy Brandt's new doctrine of *Ostpolitik* which promoted reconciliation between West Germany and East Germany.<sup>22</sup>

Before 1979, the PRC adhered to the policy of "liberating" Taiwan, while Taiwan pursued a policy of "recovering" the Mainland. During that period, the two sides advocated the use of force to achieve Chinese unification.<sup>23</sup> Since the early 1980s, tensions between Taiwan and Mainland China has relaxed. Both sides of the Taiwan Straits have moved rapidly toward closer relations in the cultural, social, trade, and investment areas.<sup>24</sup> Those closer relations necessitated contacts between Taiwan and Mainland China. To facilitate relations, both sides created semi-official organizations to deal with cross-strait affairs. Taiwan created the SEF and the PRC created the ARATS. On April 29, 1993, three agreements and a joint accord were signed between Chairman Koo Chen-fu of the SEF and Chairman Wang Tao-han of ARATS.<sup>25</sup>

Since the beginning of negotiations between the SEF and the ARATS, "the One-China principle" has been a sensitive issue for Taiwan and Mainland China. Mainland China has consistently insisted on the One-China principle as a precondition for cross-strait talks. Taiwan is unwilling to explicitly agree to this principle because most countries in the world have recognized the PRC as the sole legal

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21. See Tan Shaocheng, *supra* note 18, at 4–5; Augusto Hernández-Campos, *supra* note 6, at 82–83; Thomas D. Grant, *Hallstein Revisited: Unilateral Enforcement of Regimes of Nonrecognition Since the Two Germanies*, 36 STAN. J. INT'L L. 221, 223 (2000). Named after Walter Hallstein, State Secretary for Foreign Affairs of the Federal Republic of Germany (West Germany), the Hallstein Doctrine refers to the foreign policy of West Germany to not recognize or maintain diplomatic relations with any state that recognized the German Democratic Republic (East Germany). *Id.* at 225.

22. See Augusto Hernández-Campos, *supra* note 6, at 84.

23. Hungdah Chiu, *Koo-Wang Talks and the Prospect of Building Constructive and Stable Relations Across the Taiwan Straits (with Documents)*, 29 ISSUES & STUD. 1, 2–3 (1993) [hereinafter Hungdah Chiu, *Koo-Wang*].

24. *Recent Relations Between China and Taiwan Since 1993: Hearing on the Growth of the Chinese Military and its Threat to Taiwan Before the Subcomm. on East Asian and Pacific Affairs of the S. Comm. on Foreign Relations*, 104th Cong. (1995) (statement of Hungdah Chiu) reprinted in Hungdah Chiu & June Teufel Dreyer, *Recent Relations Between China and Taiwan and Taiwan's Defense Capabilities*, OCCASIONAL PAPERS/REPRINTS SERIES CONTEMP. ASIAN STUD., no. 3, 1996 at, 2, 2.

25. Hungdah Chiu, *Koo-Wang*, *supra* note 23, at 14–15.

government of China and inserting the One-China principle into the proposed agreement could create the impression that the ROC was submitting to the PRC's sovereignty.<sup>26</sup>

To circumvent these political differences, the two sides reached the "one-China, but different interpretations," understanding, in Hong Kong in 1992. This later became known as the "92 Consensus."<sup>27</sup> To Beijing, one China means the People's Republic of China; to Taipei, one China means the Republic of China.<sup>28</sup>

The 92 Consensus has been the cornerstone of the ROC government Mainland policy since 2008, providing the political framework to uphold the ROC's sovereignty. Following the 92 Consensus, Taiwan's mutual non-denial further reaffirmed and validated the status quo of cross-strait relations.

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26. *Id.* at 10.

27. SU CHI, TAIWAN'S RELATIONS WITH MAINLAND CHINA: A TAIL WAGGING TWO DOGS 14 (2009).

28. On August 1, 1992, the ROC's National Unification Council adopted a resolution on the meaning of "one China" as follows:

First, both of the Taiwan Straits have been adhering to the principle of one China. Nevertheless, the positions of the two sides are somewhat different. The Chinese Communists, for example, contend that one China means the People's Republic of China and that, after reunification in the future, Taiwan will become a special administrative region under the jurisdiction of the Chinese Communists. Meanwhile, our side contends that one China means the Republic of China founded in 1912 and [its] sovereignty cover all of China. Our government's current political power, however, only covers Taiwan, Penghu, Chinmen [Quemoy] and Matsu. Taiwan is a part of China and the mainland is also part of China.

Second, since the 38th year of the Republic of China [1949], China entered a temporary division and two political entities have ruled the two sides of the Taiwan Straits since then. This is an objective fact. All views on unifying the country must not overlook the existence of this fact.

Third, to develop the nation and promote the nation's prosperity and the people's welfare, the Government of the Republic of China has formulated a program for national reunification. It also has sought a common understanding among all people, and it has implemented steps to promote the reunification of the country. Therefore, it earnestly hopes that the authorities on the mainland will seek truth from facts, discard preconceived ideas, cooperate with us, and contribute to the building of a free, democratic, commonly rich, and single China.

Hungdah Chiu, *Koo-Wang*, *supra* note 23, at 10–11 (alteration in original).

## II. THE MUTUAL NON-DENIAL APPROACH

### A. *General Concept*

But what is the mutual non-denial approach? In tracing the origin of mutual non-denial one invariably finds Professor Hungdah Chiu, who as a member of the research committee of the National Unification Council (NUC), was one of the leading experts who designed and developed the concept of mutual non-denial. In 1991, the NUC adopted the Guidelines for National Unification stating “in the midst of exchanges and not denying the other’s existence as a political entity while in the midst of effecting reciprocity.”<sup>29</sup> The wording of “not denying the other’s” reflected the same spirit of President Ma’s mutual non-denial, although the Guidelines for National Unification emphasized “not denying the other’s existence as a political entity,” while President Ma insisted upon “not denying each other’s authority to govern.”<sup>30</sup>

According to President Ma, mutual non-denial means “mutual non-recognition,” *i.e.*, “the two sides [of the Taiwan Straits] do not recognize each other’s sovereignty, nor do they deny each other’s authority to govern.” He further explained why Taiwan and Mainland China cannot recognize each other’s sovereignty:

Under the ROC constitutional framework, the cross-strait relationship is not one between states, but a special relationship for which the model of recognition under conventional international law is not applicable. Therefore, we cannot and do not recognize mainland China’s sovereignty, nor should we or do we deny its authority to govern mainland China.<sup>31</sup>

Therefore, the Taiwan-Mainland China case is clearly a case of mutual non-recognition of sovereignty. And the term “authority to govern” reflects the fact that Taiwan and the Mainland can in reality exercise power to govern persons and property by its domestic law based upon effective control of territory.<sup>32</sup> In that sense, “authority to

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29. Guidelines for National Unification (adopted by the Nat’l Unification Council on Feb. 23, 1991 and by the Executive Yuan Council on Mar. 14, 1991), *available at* <http://www.mac.gov.tw/> (search for “guidelines for national unification” and then follow the second result).

30. *See* Ma Ying-Jeou, *supra* note 1.

31. *Id.*

32. For the summary of various views of scholars on this question, see Hungdah Chiu, *Legal Status*, *supra* note 13, at 7–14.



govern” is broader than the international law concept of jurisdiction, which includes both the power to prescribe rules and the power to enforce them.<sup>33</sup> In addition, “authority to govern” also means Taiwan and Mainland China may treat each other on a de facto basis as an entity without touching the issue of recognition.

On the advantages of mutual non-denial, President Ma noted:

“Mutual non-denial” of one another’s authority to govern, however, is a practical recognition of the status quo. Otherwise, the negotiation and signing of 15 legally binding agreements between the two sides would not have been possible. Only through “mutual non-denial” can cross-strait relations continue moving forward peacefully. Therefore, I see “mutual non-recognition and mutual non-denial” as the best interpretation of the cross-strait status quo and also the best approach to addressing realities, shelving disputes, and promoting peace.<sup>34</sup>

Mutual non-denial has been effective in moving Taiwan and Mainland China toward closer cultural, social, trade, and investment ties. For example, from December 15, 2008 to November 21, 2010, over 7.85 million trips were made through direct flights across the strait; from July 2008 to the end of November 2010, over 1.74 million Mainland tourists visited Taiwan.<sup>35</sup> Since the “Cross-Strait Agreement on Joint Crime-Fighting and Judicial Mutual Assistance” came into effect on June 25, 2009, the two sides have established mechanisms to share judicial documents, “conducted investigations and gathered evidence, and assisted with arrest and repatriation in over 11,200 cases.”<sup>36</sup> Notably, 70 criminals accused of fraud, kidnapping, drug crimes, and robbery were repatriated under the agreement.<sup>37</sup>

But one other significant advantage of this approach is that it does not alter the ROC’s status quo in international law as well as international relations. For a time, the ROC refused to maintain

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33. DAVID HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 228 (7th ed. 2010).

34. See Ma Ying-jeou, *supra* note 1.

35. *Opening Up and Guarding the Country Benefits of the 14 Cross-Strait Agreements*, MAINLAND AFFAIRS COUNCIL 6 (Dec. 2010), <http://www.mac.gov.tw/public/Data/11199164471.pdf>.

36. *Id.* at 13.

37. *Id.*

diplomatic relations with any state recognizing the PRC.<sup>38</sup> That policy, however, has been changed and Taiwan has abandoned its policy of intolerance of bi-lateral recognition of the PRC.<sup>39</sup> The ROC no longer competes with the PRC for the right to represent all of China,<sup>40</sup> but it can still exercise its own foreign relations powers and enter into international agreements with other states. To the United States and other countries which have recognized the PRC, there is no pressure for them to re-recognize the ROC. For the 23 states maintaining diplomatic relations with the ROC, their recognition appears to be more beneficial to their development if cross-strait relations are peaceful. With respect to participation in international organizations, it will be possible for Taiwan to bind its territory as a party to various conventions.<sup>41</sup>

*B. The Legal Foundations of Mutual Non-Denial*

The ROC's Constitution, domestic legislation, and Constitutional Court's interpretations clearly support the essence of mutual non-denial. The ROC was established on January 1, 1912. Between 1912 and 1945, various versions of the constitution were drafted and enacted, but it was not until December 25, 1946 that the constitution was adopted by the elected National Assembly. On December 25, 1947, the present ROC Constitution entered into force.<sup>42</sup> Under the 1947 ROC Constitution, both Taiwan and the Mainland are parts of the ROC.

In 1948, considering the full-scale civil war had been continuing for some time, the National Assembly amended the Constitution to adopt "Temporary Provisions Effective during the Period of Mobilization for the Suppression of Communist Rebellion," which granted extraordinary powers to the President, and suspended elections for the National Assembly, the Legislative Yuan, and the Control Yuan.<sup>43</sup> In 1949, the ROC's loss to Chinese communist forces in the Chinese civil war ended operation of the ROC

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38. JEROME ALAN COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 257–59 (1974).

39. Grant, *supra* note 21, at 231.

40. See Charney & Prescott, *supra* note 6, at 464 (citing 1994 ROC Mainland China Council's position).

41. See Crawford, *supra* note 6, at 219–20.

42. See Hungdah Chiu, *Constitutional Development and Reform in the Republic of China on Taiwan*, OCCASIONAL PAPERS/REPRINTS SERIES CONTEMP. ASIAN STUD., no. 2, 1993, at 1, 5–14 (discussing constitutional development in the Republic of China on Taiwan).

43. *Id.* at 14–16.

Constitution in Mainland China, but it has remained in force in Taiwan.

On May 1, 1991, the “Period of Mobilization for the Suppression of Communist Rebellion” and the “Temporary Provisions” of the Constitution were terminated as the beginning of a process of implementing constitutional reform.<sup>44</sup> Additional articles have been added to the 1947 ROC Constitution (1991 Additional Articles),<sup>45</sup> because enacting a new Constitution only applicable to Taiwan would imply Taiwanese independence.

The 1991 Additional Articles are revisions to the original ROC Constitution, which was enacted in 1947 when the ROC still governed Mainland China. Its effect is that the territory of Mainland China is still treated as territory of the ROC.<sup>46</sup> In doing so, the 1991 Additional Articles describe the ROC as comprised of two areas: the “free area” and the “mainland area.”<sup>47</sup> Recognizing the reality of the PRC and envisaging that cross-strait relations may be regulated by special laws, the 1991 Additional Articles authorize the government to enact a law to regulate relations on interchanges between Taiwan and Mainland China. Article 11 of the Additional Articles provides that “The relationship of rights and obligations between the people of the mainland China and those of the free area, and the disposition of other affairs shall be specially regulated by law.”<sup>48</sup>

That is why the Act Governing Relations between the People of the Taiwan Area and the Mainland Area (Cross-Strait Statute) was enacted. Passed by the Legislative Yuan in 1992, the Cross-Strait Statute governs the relations between the people of Taiwan and the Mainland, covering administrative, civic, and criminal matters arising from cross-strait interactions.<sup>49</sup> The Statute defines the “Taiwan Area” as the ROC government that exercises its effective control<sup>50</sup> and the “Mainland Area” as the ROC territory outside the Taiwan

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44. *Id.* at 32.

45. *Id.* at 31.

46. See MINGUO XIANFA art. 4 (1947) (Taiwan).

47. See Article 11 of the 1991 Additional Articles, MINGUO XIANFA (1947) (Taiwan). See also Hsieh, *Taiwan Question*, *supra* note 6, at 67.

48. See Article 11 of the 1991 Additional Articles, MINGUO XIANFA (1947) (Taiwan).

49. See Hungdah Chiu, *Koo-Wang*, *supra* note 23, at 6.

50. This includes Taiwan, Penghu, Kinmen, Matsu, and any other area under the effective control of the ROC government. See Act Governing Relations between the People of the Taiwan Area and the Mainland Area, art. 2 (Aug. 2004) (including Taiwan, Penghu, Kinmen, Matsu, and any other area under the effective control of the ROC government), available at <http://www.unhcr.org/refworld/pdfid/43a2945d4.pdf>.

Area. The statute also lays down a conflict of laws rule applicable to civil matters between the Mainland and Taiwan.<sup>51</sup>

The Constitutional Court of the ROC also found opportunities to address the problem of relations between Taiwan and Mainland China. The Court has jurisdiction to interpret the Constitution with respect to matters relating to uncertainties regarding the application of the Constitution, the constitutionality of laws or orders, and the constitutionality of local government laws.<sup>52</sup> In 1993, the Court was requested to determine the outer boundaries of the national territory of the ROC. In interpretation no. 328, the Constitutional Court avoided the issue and asserted that:

Instead of enumerating the components, Article 4 of the Constitution provides that the national territory of the Republic of China is determined “according to its existing national boundaries.” Based on political and historical reasons, a special procedure is also required for any change of territory. The delimitation of national territory according to its history is a significant political question and thus it is beyond the reach of judicial review.<sup>53</sup>

Immediately after interpretation no. 328, the Court was requested to decide whether four agreements between Chairman Koo Chen-fu of Taipei’s SEF and Chairman Wang Tao-han of Beijing’s ARATS were “international agreements.”<sup>54</sup> The Court in Interpretation no. 329 held that they were not.<sup>55</sup> Article 11 of the 1991 Additional Articles and legislation enacted under it do not deny the reality of the PRC on the Mainland Area, but the ROC on Taiwan cannot recognize the PRC because, based upon its constitution and

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51. Chi Chung, *supra* note 6, at 236.

52. See *Petitions and Procedures for Interpretation*, JUSTICES OF THE CONSTITUTIONAL COURT, JUDICIAL YUAN, [http://www.judicial.gov.tw/constitutionalcourt/en/p02\\_01\\_01.asp](http://www.judicial.gov.tw/constitutionalcourt/en/p02_01_01.asp) (last visited Apr. 12, 2012).

53. *Judicial Yuan Interpretation No. 328*, JUSTICES OF THE CONSTITUTIONAL COURT, JUDICIAL YUAN (Nov. 26, 1993), [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=328](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=328).

54. These agreements are: Agreement on the Use and Verification of Certificates of Authentication Across the Taiwan Straits; Agreement on Matters Concerning Inquiry and Compensation for [Lost] Registered Mail Across the Taiwan Straits; Agreement on the System for Contacts and Meetings between the SEF and the ARATS; and Joint Agreement of the Koo-Wang Talks. Hungdah Chiu, *Koo-Wang*, *supra* note 23, at 28–36 (alteration in original) (collecting translated versions of the agreements).

55. *Judicial Yuan Interpretation No. 329*, JUSTICES OF THE CONSTITUTIONAL COURT, JUDICIAL YUAN (Dec. 24, 1993), [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=329](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=329).

laws, the ROC is an independent state which has never surrendered sovereignty over Mainland China. Therefore, we may conclude that the ROC Constitutional amendments of 1991 do not deny the PRC's rule on the Mainland Area and confine the ROC Constitution's effective application to Taiwan.

### III. LESSONS FROM THE INTRA-GERMAN RELATIONS AND INTERNATIONAL LAW

International law may not be directly applicable to cross-strait relations, but it does provide useful references for consideration. This section reviews the experience of post World War II intra-German relations and analyzes the applicability of the international law of recognition and non-recognition to the cross-strait relations.

#### A. *Intra-German Relations*

While post-1949 cross-strait relations are in some ways quite different from the experiences of post-war Germany, in both cases the two competing parties were described as "divided States."<sup>56</sup>

On the question of the legal status of Germany after World War II, but prior to German unification,<sup>57</sup> one opinion in West Germany held that the German state has never ceased to exist after the unconditional surrender in 1945, and that the Federal Republic of Germany was the rightful heir to the German Reich and therefore did not constitute a new West German state. This position could be interpreted as the "identification theory."<sup>58</sup> On the other hand, statements made by the Government of West Germany assumed that both East and West Germany were merely artificial legal entities that

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56. E.g., Yung Wei, *From "Multi-System Nations" to "Linkage Communities": A New Conceptual Scheme for the Integration of Divided Nations*, OCCASIONAL PAPERS/REPRINTS SER. CONTEMP. ASIAN STUD., no. 1, 1998.

57. The two most important documents on German unification are the Treaty on the Establishment of German Unity, F.R.G.-G.D.R., Aug. 31, 1990, 30 I.L.M. 457 and Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, S. Treaty Doc. No. 101-20 (1990). See also Timothy Kearley, *German Division and Reunification, 1944-1990: An Overview Via the Documents*, 84 LAW LIBR. J. 1 (1992) (identifying the most important documents regarding post-war Germany's legal status, especially those most directly concerning sovereignty and division).

58. See generally Bruno Simma, *Legal Aspects of East-West German Relations*, 9 MD. J. INT'L L. & TRADE 97 (1985).

existed within the continuing legal person of the German Reich. This position could be named the “roof theory.”<sup>59</sup>

A different legal theory prevailed in the German Democratic Republic (GDR). At first, the GDR Constitution stated that East Germany was a continuation of the pre-war German Reich. In 1952, East Germany changed its policy and claimed that the Reich had been dissolved when Germany was divided and there were two competing German states.<sup>60</sup>

In order to uphold its legitimacy, the Federal Republic of Germany (FRG) isolated the GDR from 1955 to 1969 based upon the Hallstein Doctrine, by which the FRG would not establish or maintain diplomatic relations with any country that recognized the GDR.<sup>61</sup> Since 1969, the new doctrine of *Ostpolitik*, i.e., reconciliation between West Germany and East Germany, had replaced the old Hallstein Doctrine. And since 1972, the Basic Treaty regulated relations between the FRG and GDR.<sup>62</sup>

In the Basic Treaty, the FRG and the GDR agreed to strive to develop friendly relations. In order to avoid according full de jure recognition to the GDR, the FRG used various common phrases instead of legal jargon to leave more room for different interpretations of the FRG and the GDR. For example, borders between the FRG and GDR would be “respected,” not “recognized;”<sup>63</sup> both set up “permanent missions” instead of “embassies” in each other’s “government seats,” rather than “capitals;”<sup>64</sup> and the Federal Office of the Chancellor handled GDR Mission affairs by the FRG, instead of the Ministry of Foreign Affairs.<sup>65</sup>

Although in related documents the FRG stated that it would still work for the unification of Germany, after the conclusion of the

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59. See Georg Ress, *Germany, Legal Status After World War II*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 567, 572–73 (1995) (describing the theory of identification and of the related “roof theory”).

60. Rudolf Bernhardt, *Unification of Germany*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 59, at 590, 592.

61. See *supra* notes 21–22 and accompanying text.

62. Treaty on the Basis of Relations Between the Federal Republic of Germany and the German Democratic Republic (Basic Treaty), F.R.G.-G.D.R., Dec. 21, 1973, 12 *I.L.M.* 16 (1973).

63. See Tan Shaocheng, *supra* note 18 at 23.

64. *Id.* at 21.

65. *Id.*

treaty it became impossible for the FRG to deny that the GDR is a state and a legal subject according to international law. From a legal point of view it can be concluded that the Federal Republic recognized the GDR as a state under public international law.

In 1973, when the Bavarian government challenged the constitutionality of the Basic Treaty, the Federal Constitutional Court of the FRG held that under the treaty the German Reich continued to exist and that relations between the Federal Republic and the GDR are considered to be of a “special” nature. The two German States were not foreign countries with respect to their bi-lateral relations.<sup>66</sup>

The Basic Treaty model<sup>67</sup> is inapplicable to the cross-strait relations because the two sides of the Taiwan strait have overlapping sovereignty claims over each other’s territories.<sup>68</sup> These sovereignty issues are among the most complex problems related to cross-strait relations. Despite this, two lessons can be learned from the German case. First, the Basic Treaty is an interesting precedent regarding the distinction between sovereignty and the authority to govern due to the word “sovereignty” being replaced by the word “supreme power” in the Basic Treaty.<sup>69</sup> Second, Chancellor Brandt defined the GDR as a “special area,” and West-East German relations were “special relations.”<sup>70</sup> A similar approach was taken in developing the concept of mutual non-denial to apply in cross-strait relations.

### B. *The International Law of Recognition*

In the international legal system, the issue of whether an entity is a state, or whether a government can be said to represent a particular state cannot be determined by a centralized authority. Therefore, the decision is left to individual states to determine through their respective systems of recognition, *i.e.*, “the acknowledgment by the government of a State

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66. See Ress, *supra* note 59, at 573. See also THE FEDERAL REPUBLIC OF GERMANY AND THE GERMAN DEMOCRATIC REPUBLIC IN INTERNATIONAL RELATIONS 405 (Gunther Doeker & Jens Bruckner eds., 1979) (summarizing the case). This treaty helped the admission of both East and West Germany to the United Nations.

67. In the case of Korea, from the very beginning each of the two Korean Governments claimed to represent the whole of Korea, but the consolidation of the factual situation over the years has led to a wide recognition of the existence of two Korean States. Of course, to both Korean States, this situation is considered provisional. Today, many states have diplomatic relations with both. As for international organizations, both states are members of the United Nations. For a description of Korea, see Denise Bindschedler-Robert, *Korea*, in 12 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 202–08 (1990).

68. See *supra* Part II.B.

69. See Ma Ying-Jeou, *supra* note 1.

70. See Tan Shaocheng, *supra* note 18, at 11.

of the existence of a newly emergent State, or a new government emerging irregularly within an existing State, or of the existence of an insurgent party within a State exercising belligerent right.”<sup>71</sup>

International law sets forward some criteria for determining recognition of a state or a government. For example, section 201 of the Restatement (Third) of the Foreign Relations Law of the United States defines a state as: “an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”<sup>72</sup> As to whether a government can represent a particular state in the international community, some argue that the decisive legal standard is whether an entity effectively controls the territory of the state and its population.<sup>73</sup> Other authorities like 1991 Conference on Security and Cooperation in Europe (CSCE) Declaration, suggest that domestic legitimacy does matter.<sup>74</sup>

Based upon the above understanding, recognition of states or governments should be only to verify a factual situation and should not signify either approval or disapproval of the recognized state, its government or policies.<sup>75</sup> However, the practice of most states shows that the law of recognition is a highly politicized part of public international law.<sup>76</sup> A classic case is the ROC on Taiwan. If one applies the factors listed in the Restatement (Third) to the case of the ROC, then its recognition problem can be readily resolved. The ROC is in effective control of an area of 35,981 square kilometers (14,000 square miles) and has a population of approximately 23 million.<sup>77</sup> Countries in the world should thus recognize the ROC as a state, regardless of the status of cross-strait relations, because recognition has nothing to do

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71. JOHN P. GRANT & J. CRAIG BARKER, PARRY & GRANT: ENCYCLOPÆDIC DICTIONARY OF INTERNATIONAL LAW 502 (3rd ed. 2009).

72. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1986). *See also* Montevideo Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 (“The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) a capacity to enter into relations with other states.”).

73. For a summary of the various views on recognition of government *See* LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 348–64 (5th ed. 2009).

74. *See generally* Conference on Security and Cooperation in Europe [CSCE], *Declaration of the Guidelines on the Recognition of New States in Eastern Europe and in the Former Soviet Union*, 31 I.L.M. 1486 (1992).

75. *Id.*

76. I.A. Shearer, STARKE’S INTERNATIONAL LAW 118 (11th ed. 1994); Malcolm N. Shaw, INTERNATIONAL LAW 446 (6th ed. 2008).

77. *See* CIA, *Taiwan*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/tw.html> (last visited Apr. 12, 2012).



with the domestic structure or policy of the recognized state. Unfortunately, the reality is quite different. The ROC is not recognized by most countries and is not represented in the United Nations and its affiliated agencies.<sup>78</sup> No country has so far been able to recognize and establish diplomatic relations with the PRC government without severing diplomatic relations with the ROC government.

Professor Chiu took the following position on the status of Taiwan in a Congressional hearing:

According to international law, “the existence in fact of a new state or a new government is not dependent on its recognition by other states.” (Hackworth, *Digest of International Law*, Vol. 1 (1940), p. 161. Hackworth was Chief Legal Adviser of the Department of State and later served as a judge of the International Court of Justice.) This principle also finds support in the 1933 Inter-American Convention on Rights and Duties of States which provide[s] in Article 3 that “the political existence of the state is independent of recognition by other states.” While the United States may not want to formally recognize the ROC even as a state and government within the territory under its control, it may take a position somewhere in between recognition and non-recognition with respect to the international status of the ROC in Taiwan.<sup>79</sup>

This view reflects practices that informal relations have sometimes been maintained between a state and an unrecognized regime.<sup>80</sup> For example, the United States enacted the Taiwan Relations Act to treat Taiwan as a state and the governing authorities there as a government.<sup>81</sup>

In view of the above introduction on recognition, one could easily conclude that by definition, the international law of recognition of states

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78. See G.A. Res. 2758, *supra* note 12, at 2. See also Hungdah Chiu, Rong-jye Chen & Tzu-Wen Lee, *Contemporary Practices and Judicial Decisions of the Republic of China Relating to International Law [1979-81]*, 1 CHINESE (TAIWAN) Y.B. INT’L L. & AFF. 141, 142–43 (1981) (regarding the ROC’s seats in the International Monetary Fund, the World Bank, the International Development Association and the International Finance Corporation).

79. *Hearings on S. 245, A Bill to Promote the Foreign Policy of the United States Through the Maintenance of Commercial, Cultural, and Other Relations with the People on Taiwan on an Unofficial Basis, and for Other Purposes Before the S. Comm. on Foreign Relations*, 96th Cong. 820 (1979) (statement of Professor Hungdah Chiu).

80. See 1 GREEN HAYOOD HACKWORTH, *DIGEST OF INTERNATIONAL LAW* § 53 (1940).

81. See Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 15 (codified as amended at 22 U.S.C. § 3301–16 (2006)).

could not be applied to cross-strait relations. Also, unlike the Hallstein Doctrine,<sup>82</sup> the mutual non-denial approach does not attempt to enforce against Mainland China a unilateral regime of non-recognition. Mutual non-denial is a formula that while the ROC does not formally recognize the PRC in the Chinese mainland under its control, it takes a position somewhere in between recognition and non-recognition of the PRC.

#### CONCLUSION

The importance of mutual non-denial has been acknowledged by some acclaimed international law scholars who observed its mention in the 2008 Taiwan presidential campaign.<sup>83</sup> Since then, mutual non-denial has been adopted by the ROC and PRC governments to achieve peace and stability in cross-strait relations.

Mutual non-denial has implications for Taiwan, Mainland China, and other states. The international law of recognition is useless to resolve the Taiwan question. Under the ROC's constitution, cross-strait relations do not constitute international relations. In contrast to the two Germanys during the *Ostpolitik* era in the 1970s, for the foreseeable future, the ROC and the PRC can never officially recognize each other as a state.

On the other hand, under mutual non-denial, each side of the Taiwan Strait does not deny other's de facto existence in bilateral relations, thereby effectively shelving the sovereignty issue and leaving room for negotiations. Cross-Strait talks have proved to substantially reduce confrontation and tension and facilitated peace and prosperity between Taiwan and Mainland China.

Therefore, "mutual non-recognition of sovereignty and mutual non-denial of authority to govern" is an effective approach to a uniquely complex and sensitive cross-strait relationship.

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82. Grant, *supra* note 21, at 223–25.

83. DAMROSCH ET AL., *supra* note 73, at 343.